DATE: April 28, 1995

CASE NO: 93-INA-00319

In the Matter of:

PORT HURON AREA SCHOOL DISTRICT,
Employer

On Behalf of:

LI LIU,
Alien

Appearance: John N. McKenzie, Executive Director of Personnel
and Staff/Community Information Services
For the Employer

Before: Huddleston, Vittone, and Wood
Administrative Law Judges

RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to § 212(a)(14) of the Immigration and Nationality Act of 1990, 8 U.S.C. § 1182(a)(14) (1990) ("Act"). The certification of aliens for permanent employment is governed by § 212(a)(5)(A) of the Act, 8 U.S.C. § 1182(a)(5)(A), and Title 20 Part 656 of the Code of Federal Regulations. Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(14) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the

United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good-faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File,[1] and any written argument of the parties. 20 C.F.R. § 656.27(c).

Issue

The sole issue in this case is whether the Employer has unlawfully rejected a qualified U.S. applicant.

Statement of the Case

On June 24, 1992, the Port Huron Area School District ("Employer") filed an application for labor certification to enable Mr. Li Liu ("Alien") to fill the position of a high school mathematics and physics teacher at the annual salary of $23,426.00 (AF 26-28). One application was received in response to the Employer's recruitment efforts. The Employer reported that this applicant, Mr. Dennis J. Aurand, a U.S. worker, could not be hired because he allegedly uses poor English and cuts his words off, talks rapidly, and has an abrupt speech manner with unsuitable diction; does not have a personality suitable to teaching high school because it is brittle and not seen as comfortable or friendly; showed little interest in accepting extra assignments which are an essential part of a high school teacher's responsibilities; left the distinct impression he would rather work only with upper level students, which is an unsuitable attitude; did not understand terms to describe current approaches to teaching curriculum; and, was considered by the Port Huron School administrators to be very average when he was hired as a substitute teacher (AF 38).

On March 8, 1993, the CO issued a Notice of Findings in which she stated that applicant Aurand appears to meet the requirements for the position but was rejected for subjective reasons that are unrelated to the stated job requirements (AF 20-22). On April 5, 1993, the Employer submitted rebuttal (AF 14-16). The Employer set forth additional information in regard to the applicant, explaining that the applicant's evaluation as "very average" in regard to his substitute

[1] All further references to documents contained in the Appeal File will be noted as "AF *n*," where *n* represents the page number.

teaching is considered to be very low and below the standards for what they are seeking for their students. The Employer further stated that Mr. Aurand behaved "in a very obnoxious manner as he pursued the matter of our District applying for Alien Labor Certification for [the Alien]." The Employer added that this applicant wrote a "very obnoxious" letter to the school superintendent regarding the processing of the certification request. Lastly, the rebuttal noted that the high school had received complaints from high school students about his caustic attitude in the classroom when he was employed as a substitute teacher.

On April 30, 1993, the CO issued her Final Determination in which she concluded that the Employer failed to adequately rebut the deficiencies cited in the Notice of Findings (AF 11-13). The CO stated that the Employer's characterization of Mr. Aurand's personality as obnoxious in a situation which is unrelated to the applicant's qualifications for the job position cannot be used as the basis for a lawful rejection of the U.S. worker, particularly when the situation involves the applicant's attempt to gather evidence in conjunction with the filing of a complaint in regard to this application for labor certification. The CO further stated that the Employer's reasons for rejection appear to be subjective and unrelated to the stated job requirements and that the Employer has failed to submit any objective support for its conclusions regarding the applicant's ability to perform the job duties. On May 27, 1993, the Employer submitted a Request for Review of the denial of certification (AF 1-2).

Discussion

Section 656.21(b)(6) provides that if a U.S. worker applies for the job opportunity, an employer must document that the applicant was rejected solely for lawful, job-related reasons. In general, an applicant is considered to be qualified for the job opportunity if he or she meets the minimum requirements specified for that job. *United Parcel Service*, 90-INA-90 (Mar. 28, 1991). Despite the fact that an applicant meets the minimum specified requirements, an employer may still reject that applicant for the inability to perform the main job duties, but it must, in such a case, provide a more objective detailed basis of its conclusions. *Champion Zipper Corp*., 92-INA-174 (Jan. 4, 1994); *Quality Inn*, 89-INA-273 (May 23, 1990). The burden is on the employer to demonstrate on rebuttal that the applicant is unable to perform the stated job duties. See *Impell Corp*., 88-INA-298 (May 31, 1989) (*en banc*). In cases where jobs require artistic talent, a quality that can be difficult to quantify or evaluate, not unlike an individual's ability to teach, an employer may not reject U.S. applicants based upon vague, undisclosed, or general deficiencies. See *Anderson-Mraz Design*, 90-INA-142 (May 30, 1991).

Although the applicant in this case meets the minimum requirements to perform the job opportunity, *i.e.*, a state teaching certificate and the requisite number of credits in certain subjects, the Employer argues that the applicant "does not meet the skill and technical requirements to be able to teach [and that] his personality does not allow him to be able to teach in the 'people-oriented business' we are in." In its rebuttal and request for review, the Employer cites complaints by administration, teachers, and students at Port Huron High School which all attest to

his inability to conduct classroom teaching.[2] The Employer also offers a subjective evaluation of the applicant's personality based in large part on the applicant's pursuit of a complaint regarding this application for labor certification. The Employer also argues that an evaluation of "very average" is a negative review and supports its position.

We agree with the CO that the Employer's arguments have failed to rebut the deficiency set forth in the Notice of Findings. In that NOF, the CO gave the Employer notification that it had failed to submit any "objective support that the applicant cannot perform the listed job duties." Thus, the Employer was given adequate notice that the alleged defects must be cured by the submission of objective evidence supporting its position. See *Downey Orthopedic Medical Group*, 87-INA-674 (Mar. 16, 1988) (*en banc*). In response thereto, the Employer failed to submit any objective evidence in the form of teaching evaluations or parent/student letters of complaint in regard to this applicant's teaching abilities, or explanations of teacher evaluation procedures which can result in an average rating for a teacher who is unable to perform the teaching duties. The Employer's evaluation that the applicant's pursuit of information concerning this application for labor certification resulted in obnoxious behavior and that his rating as a "very average" teacher is a negative assessment of his skills fails to meet the standards of proof set forth in *Quality Inn*, *Impell Corp*., or *Anderson*. Such evaluations are subjective and self-serving in regard to the former, and vague and unsupported in the later. Therefore, because the Employer has failed to submit any objective documentation concerning the applicant's ability to perform the requirements set forth in the job opportunity, it has thus failed to meet its burden of proof. Because the Employer has failed to meet its burden of proof, it has failed to document that this applicant was rejected solely for lawful, job-related reasons as required by § 656.21(b)(6). Accordingly, the CO's denial of labor certification must be AFFIRMED.

ORDER

The Certifying Officer's Denial of Labor Certification is hereby AFFIRMED.

Entered this the ____ day of April, 1995, for the Panel:

_____

Richard E. Huddleston
Administrative Law Judge

[2] In its request for review, the Employer set forth additional information, for the first time, concerning the applicant's current status as a substitute teacher, which it contends is relevant to the issue before us. Section 656.26(b) (4) provides that the request for review "shall contain only legal argument and only such evidence that was within the record upon which the denial of labor certification was based." Thus, this information cannot be considered at this time.

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except **(1)** when full Board consideration is necessary to secure or maintain uniformity of its decisions, or **(2)** when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002.

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition the Board may order briefs.